



LE COPY No. 12

Office-Supreme Court, U.S.

FILED

JAN 30 1959

JAMES F. BREWING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

The Minneapolis & St. Louis Railway Company, APPELLANT

United States of America and Interstate Commerce  
Commission

State of South Dakota and Public Utilities Commission of  
the State of South Dakota, APPELLANTS

United States of America and Interstate Commerce  
Commission

State of Minnesota and Minnesota Railroad and Warehouse  
Commission, APPELLANTS

United States of America and Interstate Commerce  
Commission

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

J. E. RANKIN,  
Attorney General,

VICTOR E. NARINS,  
Assistant Attorney General,

CHARLES H. WESTON,  
Attorney,

Department of Justice, Washington 25, D.C.

ROBERT W. GEMMELL,  
General Counsel,

W. FRANKLIN TAYLOR, JR.,  
Associate General Counsel,  
Interstate Commerce Commission, Washington 25, D.C.

## INDEX

	Page
Statement.....	2
Argument.....	5
Conclusion.....	15

### CITATIONS

#### Cases:

<i>Chicago Junction</i> , 71 I.C.C. 631.....	8
<i>Clinchfield Ry. Lease</i> , 90 I.C.C. 113.....	9
<i>McLean Trucking Co. v. United States</i> , 321 U.S. 67 12, 13, 14	
<i>New York Central Securities Co. v. United States</i> , 287 U.S. 12.....	5
<i>Pacific Coast R.R. Co. Control</i> , 282 I.C.C. 600.....	9
<i>Wabash R. Co. Control</i> , 247 I.C.C. 365.....	8-9

#### Statutes:

##### Clayton Act:

Section 7, 15 U.S.C. 18.....	12
Section 10, 15 U.S.C. 20.....	10, 11, 12

##### Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:

Section 5.....	2, 3, 12, 13
Section 5(2)(a).....	3
Section 5(2)(b).....	3
Section 5(2)(c).....	3, 5
Section 5(11).....	3, 12

##### Sherman Act:

Section 1, 15 U.S.C. 1.....	12
-----------------------------	----



# In the Supreme Court of the United States

OCTOBER TERM, 1958

---

No. 552

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION

---

No. 620

STATE OF SOUTH DAKOTA AND PUBLIC UTILITIES COMMISSION OF  
THE STATE OF SOUTH DAKOTA, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION

---

No. 633

STATE OF MINNESOTA AND MINNESOTA RAILROAD AND WAREHOUSE  
COMMISSION, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION

---

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA

---

## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(e) of the Revised  
Rules of this Court, the United States of America and

the Interstate Commerce Commission move that the judgment of the district court be affirmed.

#### STATEMENT

These are direct appeals from the final judgment of a three-judge district court dismissing a complaint which sought to set aside orders of the Interstate Commerce Commission authorizing the Atchison, Topeka & Santa Fe Railway Company (Santa Fe) and the Pennsylvania Railroad Company (Pennsylvania) to acquire joint control of the Toledo, Peoria & Western Railroad Company (Western) through ownership of equal amounts of Western's capital stock.

Western is essentially a bridge carrier for east-west traffic and derives more than two-thirds of its total revenues from overhead or bridge traffic. As described in the Commission's report (J. St. 59-60):

The main line of Western extends from its eastern terminus at Effner, on the Illinois-Indiana State line, via Peoria, to the western termini at Keokuk, Iowa, and Lomax [Illinois], approximately 234 miles. \* \* \* It has connections for the interchange of traffic with 16 railroads, the principal ones being with the Pennsylvania at Effner; with the Santa Fe at Lomax, and with several carriers [including appellant<sup>1</sup>] at Peoria, a point almost midway between Chicago and St. Louis. \* \* \*

---

<sup>1</sup> We use the word "appellant" to refer to the Minneapolis & St. Louis Railway Company, appellant in No. 552. Appellants in Nos. 620 and 633 will be respectively referred to as the South Dakota appellants and the Minnesota appellants. The references throughout this motion to "J. St." are to the jurisdictional statement filed by the railway appellant.

On July 8, 1955, the Santa Fe and Pennsylvania (and Pennsylvania's parent, Pennsylvania Company) filed with the Commission an application for approval, under Section 5(2) of the Interstate Commerce Act, of a proposed joint acquisition of control of Western. Subsequently appellant also applied for authority under this section to acquire control of Western through ownership of Western's entire capital stock. Appellant intervened in opposition to the Santa Fe-Pennsylvania application and the joint applicants intervened in opposition to appellant's application.

Subsections (a) and (b) of Section 5(2) provide that it shall be lawful, with the approval of the Commission, for any carrier (or two or more carriers jointly) to acquire control of another through stock ownership if the Commission finds that the acquisition "will be consistent with the public interest." Section 5(2)(c) provides that in passing upon a proposed acquisition of control, the Commission shall give weight to (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. Section 5(11) provides that the authority conferred by Section 5 shall be exclusive and plenary, and that the participants in an approved transaction are relieved from the operation of the antitrust laws and of all other prohibitions of law insofar as necessary to carry the transaction into effect.

The State of Illinois, various communities, civic organizations, and shippers located along the line of

Western, and the Railway Labor Executives Association (on behalf of Western's employees) intervened in support of the Santa Fe-Pennsylvania application. The States of Minnesota and South Dakota and their respective utility regulatory bodies intervened in support of appellant's application.

The two applications were consolidated for hearing. After the taking of extensive oral and documentary evidence, the hearing examiner issued a proposed report, recommending approval of the Santa Fe-Pennsylvania application and dismissal of appellant's application. The matter was heard by Division 4 on exceptions to this report, and Division 4, after oral argument, issued a report and order authorizing the acquisition of control of Western by Santa Fe and Pennsylvania and dismissing appellant's application. The Division found, subject to the conditions for the protection of railway employees and the maintenance of existing routes and channels of trade referred to in its report, that the terms and conditions of the proposed Santa Fe-Pennsylvania acquisition are "just and reasonable", and that the transaction "will be consistent with the public interest" (J. St. 94).

By order of October 30, 1957, the entire Commission denied the petitions for reconsideration filed by appellant and others, and made the order of Division 4 effective thirty days from the date of service of the order of October 30, 1957 (J. St. 96-98). Appellant thereupon instituted the present action, and the district court issued a temporary restraining order staying the effectiveness of the Commission's orders pending its determination of the case on the merits.

The district court, in an opinion which carefully considered and rejected appellant's principal contentions, unanimously sustained the validity of the Commission's orders (J. St. 37-54). The court discharged its temporary restraining order, but granted a 30-day stay and, after appellant had filed its notice of appeal, enjoined enforcement of the Commission's orders during the pendency of the appeal to this Court.

#### **ARGUMENT**

##### I

Appellant contends (J. St. 13-26) that the Commission's ultimate "public interest" finding lacks the support of essential subsidiary findings and that the Commission erroneously failed to accord appellant a "comparative hearing". These sweeping, but very generalized, claims of error are to be tested against the Commission's actual findings, which, we submit, furnish ample foundation for the Commission's determination and order. Application of the statutory test requires the Commission to consider numerous factors—whether a proposed acquisition will promote "adequate transportation service to the public"; the "best use of transportation facilities"; and the interests of affected shippers, railroads, and carrier employees. See Section 5(2)(e) of the Act; *New York Central Securities Co. v. United States*, 287 U.S. 12, 25.

---

\*The contention that certain Commission findings are unsupported by the evidence and that others are contrary to the evidence is, we believe, sufficiently answered by the Santa Fe-Pennsylvania motion to affirm filed in No. 552 (pp. 17-21).

The Commission found that two-thirds of Western's revenues are derived from overhead or bridge traffic; that Western provides an east-west route bypassing the congested Chicago and St. Louis terminals; that over 70% of its interline traffic is interchanged with the Santa Fe or Pennsylvania or both; that only about 8% of appellant's revenues come from traffic interchanged at Peoria with Western, and only about 4% from bridge traffic so interchanged; that, among Western's 16 railroad connections, appellant ranks seventh in volume of interchange; that the Santa Fe and Pennsylvania have coordinated their schedules with Western; and that, on both westbound and eastbound traffic, service via Western's full route and the Santa Fe is substantially faster than via the Santa Fe to its junction with appellant at Nemo, via appellant between Nemo and Peoria, and via Western between Peoria and its eastern end at Effner (J. St. 60-61, 68-69).<sup>3</sup> The Commission further found (*id.* 89):

Fast, strong, and reliable through transportation service is necessary in order for the railroads adequately to compete with the other modes of modern transportation, and Western, as a direct east-west line, supplies the short-line connection for providing this through service with a minimum of delay.

<sup>3</sup> Related findings are that the large volume of traffic moving via Western's route evidences "the superior connecting service it provides", whereas appellant has not coordinated schedules with the Santa Fe at Nemo or with the Western at Peoria on east bound traffic, and that appellant's Peoria-Nemo traffic "does not move on a competitive service basis" (J. St. 78).

The Commission found that appellant's proposal "inequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers" with which it presently interchanges traffic; that while Western would remain a separate corporate entity, its ownership, management, and operation would be integrated with appellant; that its headquarters and general offices would be moved from Peoria to the city of Minneapolis; and that of Western's present 24 executive positions, only a trainmaster and roadmaster would be retained for direct supervision of Western's trackage (*Id.* St. 71). In contrast to appellant's proposal to eliminate Western as a separate operating entity, the Santa Fe-Pennsylvania contract for acquisition of Western's stock provided, as found by the Commission, (1) that Western will be operated under local management as a separate and independent carrier, (2) that Western will maintain its own solicitation forces and be free to solicit the traffic best serving Western's needs, (3) that all of Western's existing routes will be maintained and kept open without discrimination as between connecting railroads, and (4) that Western will have 11 directors consisting of its president, two Santa Fe representatives, two Pennsylvania representatives, and six "prominent citizens" not connected with the Santa Fe or the Pennsylvania (*id.* 63-64). This would be a continuation of Western's past and present policy of maintaining neutrality as between all connecting railroads (*id.* 60).

The Commission found that the communities served by Western, the shippers who appeared as witnesses,

and all of the railroad intervenors<sup>1</sup> "insist that the separate and independent operation of Western under its present local management is a public necessity" (J. St. 72), and virtually every shipper and community witness stressed the desirability of retaining Western's headquarters at Peoria "in order to continue the present easy access to management which is of inestimable value to shippers" (*id.* 91). It likewise found that Western's employees unanimously favored the grant of the Santa Fe-Pennsylvania application (*id.* 88).

The Commission noted that the Santa Fe and Pennsylvania had agreed to accept certain specific conditions to any order of approval, and the Commission's order was, in fact, made subject to these conditions (J. St. 83, 85, 95). Included among these express conditions were that Western maintain and keep open all existing routes and channels of trade, continue its present neutrality of handling inbound and outbound traffic without discrimination as to routing or movement of traffic, continue its present traffic and operating relationships with all connecting lines, and accept and handle all inbound and outbound cars without discrimination as between cars destined to or received from competing carriers (*id.* 83-84).<sup>2</sup>

---

<sup>1</sup> The intervening railroads were: New York, Chicago & St. Louis Railroad (Nickle Plate), the Chicago, Rock Island, and Pacific Railroad (Rock Island), the Chicago, Burlington & Quincy Railroad (Burlington), and the Wabash Railroad (Wabash).

<sup>2</sup> The Commission has recognized the efficacy of separate and independent operation of a controlled carrier (*Chicago Junction case*, 71 I.C.C. 631, 638-639; *Wabash R. Co. v. Control*, 27

The Commission found that unification of Western's operations with that of appellant "would be extremely harmful to other carriers" (J. St. 73), but that the Santa Fe-Pennsylvania acquisition would result in no appreciable diversion of traffic from other carriers (*id.* 75-82). Particular attention was paid to the question of diversion of traffic from appellant (*id.* 77-79).

Still other findings were that the combined efforts of the industrial development departments of the Santa Fe and Pennsylvania could be expected to lead to location of new industries on Western's line and that the city officials and chamber of commerce representatives of communities on Western's line all "recognized the advantage of Santa Fe-Pennsylvania ownership as an economic stimulus to the industrial development of their communities"; that Western would be assisted in railroad-management techniques, realization of operating economies, and economical large-volume purchases by the presence on its Board of Santa Fe and Pennsylvania representatives (J. St. 90-92).

While appellant additionally contends that the Commission failed to accord a "comparative hearing" of the two mutually exclusive applications which were before it, the contention, as elaborated, merely constitutes an attack on the Commission's evaluation of the evidence or of the factors determinative of the public interest. To the extent that the contention is that

---

L.C.C. 365, 370-371; *Pacific Coast R.R. Co. Control*, 282 L.C.C. 600, 607), and it has had occasion to require such separate operation (*Clinchfield Ry. Lease*, 90 L.C.C. 113, 132-133).

the Commission erred in not making an item-by-item comparison of the competing proposals, the answer is that they differed so radically in character that such a comparison was neither requisite nor appropriate.

To summarize, the Commission was certainly right in viewing the public interest as "the prime consideration" (J. St. 93). The findings previously referred to cover all relevant factors and amply support the Commission's conclusion. The court below recognized that "the Commission's expertise is not infallible", but held, we submit properly, that its order was based on "adequate findings supported by substantial evidence", and that in these circumstances a reviewing court cannot substitute its judgment for that of the administrative agency (J. St. 50, 54).

## II

Appellant contends (J. St. 26-29) that the Commission erred in sanctioning an acquisition of control which involved a prior violation of Section 10 of the Clayton Act, 15 U.S.C. 20. The section makes it unlawful for an interstate railroad to have any "dealings in securities, supplies, or other articles of commerce", aggregating more than \$50,000 in any one year, with any corporation when any person who is a director of the railroad is at the same time a director of the other corporation, unless the purchase or dealings shall be pursuant to competitive bidding and with the bidder most favorable to the railroad. The alleged violation of the statute is predicated upon the following facts: 82% of Western's stock was held by two trustees, and when the Santa Fe-Pennsylvania agreed to purchase this stock, one of the two trustees, the

Delaware Trust Company, had four directors who were also directors of Pennsylvania.<sup>6</sup>

The plain purpose of Section 10 is to prevent a railroad from buying at too high a price or selling at too low a price, resulting from the existence of some common relationship between it and the seller or buyer. The Santa Fe-Pennsylvania purchase of Western's stock is, however, totally unrelated to the evils Section 10 is designed to prevent. If the price paid for Western's stock was high, the factor determinative of this price was competition for the stock between appellant and Santa Fe-Pennsylvania (J. St. 62-63), not any common relationship between one of the sellers and Pennsylvania. The purchase was also remote from the evils against which Section 10 was directed because both Santa Fe's purchase agreement and the agreement by which Pennsylvania became a 50% purchaser were subject to the Commission's approval (*id.* 63), which approval entailed determination that the price paid for the stock was reasonable (J. St. 85-86).

The sole sanction for Section 10 is a criminal prosecution, and the Commission is not authorized either to enforce the section or to determine whether it has been violated. Moreover, even if the Commission had concluded that Section 10 had been violated, the statute expressly authorized it to approve the acquisition notwithstanding such violation. Section 5(11) pro-

<sup>6</sup> Santa Fe agreed to purchase all the stock held by the trustees at \$135 a share, and also made agreements with the remaining stockholders of Western to purchase their Western stock at the same price, and, about a month after the agreement with the trustees, agreed to sell 50% of Western's stock to Pennsylvania's parent, The Pennsylvania Company, at \$135 a share (J. St. 63).

vides that the authority given the Commission by Section 5 shall be "exclusive and plenary", and that any person participating in a transaction approved under Section 5 is "hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal \* \* \*". While the Commission probably may not "ignore" the policy embodied in Section 10 of the Clayton Act (see *McLean Trucking Co. v. United States*, 321 U.S. 67, 86), in this case it did not disregard such policy. It gave consideration to the only relevant aspect of the section when it considered the fairness of the price paid for the Western stock. The Commission would have been remiss if it had made its determination of the public interest turn on a technical breach of the provisions of Section 10, rather than on the questions of large importance relating to adequate transportation service to the public which the Commission viewed as making the acquisition "in the public interest."

### III

Appellant's final contention (J. St. 29-34) is that the acquisition of control approved by the Commission "violates the wording, the principle and the spirit of" the antitrust laws, and Section 1 of the Sherman Act and Section 7 of the Clayton Act in particular (*id.* 30). Appellant recognizes that, under Section 5(11) of the Act, the Commission's approval of an acquisition immunizes it from the operation of the antitrust laws, but appellant asserts that the Commission improperly failed to set forth in its report its reasons for concluding that the transportation con-

siderations favoring the Santa Fe-Pennsylvania acquisition outweighed any opposing antitrust considerations.

In *McLean Trucking, supra*, which involved a Section 5(2) order and presented precisely the issue here raised by appellant, this Court said (321 U.S. 67, 83) :

The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5(11), that the policies of the antitrust laws determine "the public interest" in railroad regulation only in a qualified way.

The Court said (*id.* at 85) that Congress, in authorizing mergers and acquisitions of control, "did not import the general policies of the anti-trust laws as a measure of their permissibility". It said further (*id.* at 87) that the Commission has the duty "to consider the effect of the [acquisition] on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy". It said that the Commission, in determining whether an acquisition "will assist in effectuating the over-all transportation policy", has the duty of considering both the effects of any curtailment of competition and the advantages of improved service, lower cost, etc., resulting from a proposed acquisition (*ibid.*). "Resolving these considerations is a complex task", and "Congress left that task to the Commission" (*ibid.*).

In the instant case, the Commission devoted much of its long report to an analysis of the effect of the Santa Fe-Pennsylvania acquisition upon competing carriers,

including appellant. It considered whether this acquisition would have an adverse competitive effect on other carriers and found that it would not (J. St. 75-82). The Commission summarized its conclusion on this aspect of the proceeding as follows (J. St. 81-82):

We are convinced that the benefits to be derived from the operation of Western under the control of the Santa Fe and the Pennsylvania as proposed will be in furtherance of the over-all national transportation policy declared by the Congress, and its consummation will not unduly curtail competition in connection with the other carriers. Compare *McLean Trucking Co., v. U.S.*, 321 U.S. 67.

We submit that, under the tests and principles enunciated by this Court in *McLean Trucking*, the Commission plainly fulfilled its statutory duty.

#### IV

The Minnesota and South Dakota appellants stress the importance to the economy of their respective States of the appellant railroad's transportation service. Since the legal questions which these appellants present are those which have already been considered, we believe it unnecessary to discuss separately the contentions made by the Minnesota and South Dakota appellants.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the appeals present no substantial question and that the judgment of the district court should be affirmed.

J. LEE RANKIN,  
*Solicitor General.*

VICTOR R. HANSEN,  
*Assistant Attorney General.*

CHARLES H. WESTON,  
*Attorney.*

ROBERT W. GINNANE,  
*General Counsel,*

B. FRANKLIN TAYLOR, JR.,  
*Associate General Counsel,*  
*Interstate Commerce Commission.*

JANUARY 1959.